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IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN JOSE DIVISION

FINJAN, INC., a Delaware Corporation,

Plaintiff,

v.

CISCO SYSTEMS, INC., a California
Corporation,

Defendant.

Case No.: 5:17-cv-00072-BLF-SVK

**DEFENDANT CISCO SYSTEMS, INC.'S
NOTICE RE THE IMPACT OF THE
COVID-19 PANDEMIC ON THE JUNE 1
TRIAL DATE**

Date: April 30, 2020
Time: 1:30 PM
Courtroom: 3, 5th Floor
Judge: Hon. Beth L. Freeman

REDACTED

1 During the March 26, 2020 hearing on the parties' respective *Daubert* motions, Finjan
2 sought to move the June 1 trial date to the Fall in light of the COVID-19 pandemic and its likely
3 impact on the ability to empanel a jury and otherwise proceed with trial. Ex. A at 79. Optimistic
4 that additional information would be available by the time of our pretrial hearing, this Court
5 indicated it would address Finjan's request at that time, as the Court believed it might have greater
6 clarity regarding the ability to proceed with the current schedule, which includes jury selection on
7 May 29 and trial on June 1. *Id.* at 80.

8 In anticipation of the pretrial conference set for April 30, 2020, defendant Cisco Systems,
9 Inc. ("Cisco") files this Notice to provide the Court with information Cisco believes relevant to the
10 Court in determining whether the jury selection and jury trial of this case can safely and effectively
11 proceed on May 29 and June 1, respectively, and to express its concerns (both health and logistics
12 related) with maintaining the existing schedule in light of COVID-19 pandemic. As explained
13 below, if the Court determines that it will maintain the current jury trial schedule, Cisco's legal team
14 must attempt to navigate international travel policies and prohibitions for four of its witnesses,
15 determine a plan for self-quarantining in the Bay Area in advance of trial, and other extremely
16 complicating trial logistics as a result of the COVID-19 pandemic. Further complicating matters
17 was the announcement made just yesterday, April 27, 2020, that Santa Clara and surrounding
18 counties intend to extend the existing shelter in place orders at least through the end of May, 2020.
19 This extension is, in Cisco's view, a significant and insurmountable hurdle to navigate with jury
20 selection on May 29 and trial on June 1. *See also* Ex. P (local orders factor for reopening).

21 Despite the passage of over a month since the *Daubert* hearing, it remains uncertain when it
22 will be safe to bring large groups together from across the country and the world to spend
23 substantial time in close proximity, as required for trial preparation and the trial itself—and what
24 precautionary measures need to be taken to ensure the health and safety for gatherings of this size.
25 Available information from the CDC, the White House, the Administrative Office of the U.S.
26 Courts, and the governors of California and of other states from which witnesses in this case will
27 be traveling indicates that proceeding with jury selection on May 29 will be in contravention of the
28 county and state shelter in place orders, that jury selection on May 29 and a trial on June 1 will

1 require counsel and witnesses to unnecessarily travel from out of state and out of the country, and
 2 that federal courts are still developing safeguards to protect jurors, counsel, the Court, and the
 3 witnesses against exposure to COVID-19 during trial (Ex. P), all of which strongly mitigates
 4 against proceeding on the scheduled dates.

5 While jury trials are currently suspended in the Court through May 1, 2020 (as of April 28,
 6 2020) [Ex. G], the shelter in place order for Santa Clara County (and six other Bay Area counties)
 7 will be extended, largely unmodified, through the end of May 2020. Ex. C. Cisco attaches for
 8 reference the current order because the new order has not yet issued but is expected to largely
 9 mirror the existing order with slight modifications. Ex. O. Likewise, the state-wide stay at home
 10 order for California remains in effect “until further notice,” and the Governor of California recently
 11 indicated that even when the state-wide order changes, stricter local orders will control. Ex. H; Ex.
 12 Q. Thus, Cisco, its witnesses, trial vendors, and counsel will be unable to arrive in California late
 13 in the week of May 18th, as needed to prepare in person for trial, and it does not appear that jury
 14 selection can go forward on May 29.

15 Moreover, the White House plan provides for a phased reopening of the economy, as
 16 certain thresholds are met over a period of time, and it is unclear where California stands with
 17 respect to these thresholds and whether the thresholds can be met in time for a June 1 trial. In fact,
 18 data from the Institute for Health Metrics and Evaluation (IHME), an independent global health
 19 research center at the University of Washington, forecasts that May 18-24 is the *earliest* time frame
 20 that California may possibly be in a position to begin the steps to relax social distancing but only if
 21 it enforces containment strategies that include “limiting gathering size.” Ex. J. *See* also Ex. N.

22 Also, most of Cisco’s witnesses will be traveling by air to San Jose from around the country—
 23 and, in four instances, from outside of the United States—for this trial. These witnesses and the
 24 locations from which they would be flying are as follows:

25 [REDACTED]
 26 [REDACTED]
 27 [REDACTED]
 28 [REDACTED]

1 [REDACTED]
 2 [REDACTED]
 3 [REDACTED]
 4 [REDACTED]

- 5 • Stephen Becker (expert witness): Austin, Texas
- 6 • Patrick McDaniel (expert witness): State College, Pennsylvania
- 7 • Atul Prakash (expert witness): Ann Arbor, Michigan
- 8 • Walter Overby (expert witness): Des Moines, Iowa

9 Grigg Decl. ¶ 2. To proceed with the trial as currently scheduled, Cisco's trial team, including
 10 lawyers, support staff, and trial support vendors, would have to relocate from around the country to
 11 San Jose, beginning the week of May 18th, as mentioned above. For example, trial counsel for
 12 Cisco will be traveling to San Jose from Atlanta, Georgia and Philadelphia, Pennsylvania.

13 The CDC's current COVID-19 guidelines continue to warn against airplane travel and hotel
 14 stays, advising citizens to stay home as much as possible, avoid close contact with others, and
 15 practice social distancing. Ex. B. The shelter in place order issued by Santa Clara County also
 16 recommends that individuals moving into the Bay Area quarantine for fourteen days after arrival.
 17 Ex. O. The CDC has emphasized the importance of quarantining and social distancing for certain
 18 high risk groups, [REDACTED] undoubtedly members of the
 19 jury pool, and individuals who live with those who will be at trial. Ex. D; Grigg Decl. ¶ 4.

20 [REDACTED]
 21 [REDACTED]
 22 [REDACTED]
 23 [REDACTED]
 24 [REDACTED]
 25 [REDACTED]
 26 [REDACTED]
 27 [REDACTED]
 28 [REDACTED]

[REDACTED]. India also has a stringent lockdown order in effect. Ex. L. Even if these witnesses were able to come to the United States, the CDC still recommends that individuals traveling from outside the United States self-quarantine for fourteen days after arrival, which would in effect require these witnesses to arrive in the U.S. two weeks before their anticipated testimony date and may further remove them from their families if they are required to self-quarantine upon their return to their home country. Exs. B, F, L.

In addition to the directives from governmental and health authorities, Cisco's current corporate policy, [REDACTED]

Grigg Decl. ¶ 8.

Cisco recognizes this trial has been on calendar for a long time, and understands the importance of moving it to trial. However, Cisco respectfully submits that the COVID-19 pandemic and related health concerns strongly militate against jury selection proceeding on May 29, with a jury trial proceeding on June 1, 2020. Ex. J. The wide range of locations of Cisco's witnesses and trial team creates an even greater risk of exposure to infection from COVID-19 based on air travel, the need to stay at hotels, and the close proximity demanded by a jury trial. Further, Cisco's fact witnesses, experts, and trial team are reasonably concerned about the possibility of their ability to self-quarantine for fourteen days after returning to reduce the risk of infecting their families. Grigg Decl. ¶¶ 2-7; Exs. B, E, F, L. Of course, these risks equally apply to prospective jurors who would participate in jury selection, and increase for those jurors actually selected. *See also* Ex. P.

As of the date of the Pretrial Conference, this case will be less than a month from jury selection. Cisco requests that, if possible the Court notify the parties of whether trial will proceed as scheduled at the Pretrial Conference. If this trial is going to be postponed, which Cisco believes is the right thing to do under the circumstances of this unprecedented pandemic, Cisco will need to provide the necessary notices to its experts, trial support vendors, and hospitality providers. If, on the other hand, the trial will proceed on June 1, Cisco's legal team will need to consider how Cisco can comply with such an order while simultaneously complying with local and state orders; protecting the health and safety of its employees, witnesses, and counsel; and allowing Cisco to fully and properly participate in a trial in a way that will not severely prejudice its case.

Dated: April 28, 2020

DUANE MORRIS LLP

/s/ Nicole E. Grigg

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